

No. 76-332

Supreme Court, U. S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, CON-  
TINENTAL TELEPHONE CORPORATION, UNITED TELEPHONE  
COMPANY OF THE CAROLINAS and the UNITED STATES  
INDEPENDENT TELEPHONE ASSOCIATION, ET AL.,  
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and the UNITED  
STATES OF AMERICA, ET AL.,  
*Respondents.*

On Petition for a Writ of Certiorari to The United States  
Court of Appeals for the Fourth Circuit

**REPLY OF PETITIONERS**

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**REPLY OF PETITIONERS**

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This reply is submitted by petitioners in response to  
oppositions to certiorari filed by respondents ("FCC  
Br."), respondent-intervenors ("API Br."), and  
Aeronautical Radio *et al.* ("ARINC Br."). The op-  
positions provide no persuasive reason for denying

certiorari. Examination of their arguments and of other events since the petition was filed confirms the importance of the case and the presence of serious jurisdictional issues which have not been, but should be, resolved by this Court.

**I. Certiorari Is Supported by Requests of State Authorities, Continuing FCC Regulatory Measures, and Conflict in the Decisions.**

1. In urging certiorari, petitioners showed that this case presented the basic statutory question of regulatory jurisdiction over 100 million telephones and other pieces of terminal equipment; that it involved a direct and concrete clash between the FCC and state regulatory authorities; and that it has extremely important consequences for the provision and regulation of telephone service in the United States. None of these facts is disputed in the oppositions.

The importance of the case is further confirmed by additional requests that this Court grant certiorari. Independent certiorari petitions have now been filed by the National Association of Regulatory Utility Commissioners ("NARUC"), the quasi-governmental body including the public utility authorities in all 50 states,<sup>1</sup> and by the Southeastern Association of Regulatory Utility Commissioners ("SEARUC").<sup>2</sup> Regulatory authorities in North Carolina, Ohio, New Mexico, and Nebraska have also petitioned or supported the petitions as *amici curiae*.

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<sup>1</sup> The status of NARUC has been recognized by Congress in the Interstate Commerce Act and the Communications Act. 49 U.S.C. § 305(f); 47 U.S.C. § 410(e).

<sup>2</sup> SEARUC includes regulatory commissioners of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia.

The presence of state interests assures that *all* of the principal interests involved can be heard if plenary review is granted—the FCC, state regulatory interests, the carriers, and private manufacturing and supplier interests having different stakes in the ultimate outcome. In addition, this Court has in the past given due weight in considering certiorari requests to the fact that review has been sought by even a single state. See *New York v. United States*, 326 U.S. 572, 574 (1946); *Alaska v. Arctic Maid*, 366 U.S. 199, 202 (1961).

2. Respondents also do not dispute petitioners' contention that the FCC's jurisdictional claim involves a matter of continuing importance and that the FCC is seeking to apply it in regulatory matters even beyond the field of equipment. In addition to the direct preemption of state authority in *Telerent*, the FCC is relying upon *Telerent* for a major new program requiring registration of all new telephone terminal equipment in the country (Pet. 18-19) and to preempt regulation by two other states of intrastate telephone service. *Id.* at 19-20. Petitioners pointed out that *Telerent* almost certainly presaged FCC attempts to regulate intrastate rates themselves. Pet. 20.

The impact on state ratemaking authority is confirmed by NARUC (Pet. 11), SEARUC (Pet. 42), and the state *amici*. N. Mex. Br. 3; Ohio Br. 5. As SEARUC's brief clearly shows, "[t]he FCC's order . . . would foreclose the states from pursuing their ratemaking policies so far as terminal equipment is concerned, and would create pressures leading inexorably to higher residential telephone rates." Yet even the FCC conceded in *Telerent* that Sections 2(b)(1) and 221(b) were designed—at the very least—to pre-

serve "traditional State jurisdiction over intrastate rates and services . . . ." Pet. App. 29b.

Since the petitions were filed in September 1976, the FCC has confirmed this prediction and begun a new rulemaking proceeding which—considered in light of an earlier FCC report—directly threatens to invade state authority over intrastate rates.<sup>3</sup> This new venture confirms that the consequences of the FCC's new jurisdictional claim are virtually unlimited. It also makes nonsense of the FCC's attempt in *Telerent* to support its authority over terminal equipment by purporting to distinguish and respect Congress' concern to preserve "traditional State jurisdiction over intrastate rates and services."

In sum, the present "preemption" case, the FCC registration program, and the FCC's new rate-related inquiry confirm that the agency is now initiating a major restructuring of telephone terminal equipment regulation in this country. The very premise and foundation of this entire multifaceted program is the FCC's claimed statutory authority and preemptive power that is in issue in this case. It is therefore es-

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<sup>3</sup> By order released on November 8, 1976 (FCC 76-1008), the FCC initiated a new proceeding to consider further regulatory changes directly affecting terminal equipment and the rates associated with it. That order suggests that one objective of the proceeding will be "to insure that business vertical services, rather than basic local telephone services, are not among the beneficiaries of separations effects. . . ." *Id.* at para. 7, quoting an earlier FCC report released on September 27, 1976 (FCC 76-879). That report (para. 253) confirms that the new proceeding looks toward measures including the "unbundling" of local telephone equipment and service rates, establishing "network access" charges, and revision of intrastate "line charges" to assure that they are "compensatory." These are the very charges for and in connection with intrastate and exchange service which—like terminal equipment—are supposed to be beyond the FCC's jurisdiction under Sections 2(b)(1) and 221(b).

sential that the basic jurisdictional issue be definitively resolved as swiftly as possible and before this massive regulatory program irreparably alters the industry and the long continued distribution of authority over telecommunications.

3. Respondents are mistaken in contending that there is no conflict in decisions meriting certiorari. The petition showed that this Court has repeatedly held that state regulation should not be displaced in favor of federal regulation unless such an intention is "clearly indicated" by Congress.<sup>4</sup> The *Telerent* decision not only subverts state regulation of terminal equipment which has existed for over half a century (Pet. 21) but it does so in disregard of the plain language of the Act, violating yet another principle of statutory construction laid down by this Court.<sup>5</sup>

Equally striking is the conflict between the decision of the court below and the decision of the District of Columbia Circuit in *Kitchen v. FCC*, 464 F.2d 801 (1972). There, the Court of Appeals held that "[e]ven if" a switching facility handling interstate and intrastate calls was otherwise within the FCC's jurisdiction as part of an interstate line under Section 214 of the Act, Section 221(b) "exclude[d]" the facility from "the jurisdiction of the Commission" because it represented a "facility" for or in connection with exchange service. 464 F.2d at 803.<sup>6</sup> The language and

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<sup>4</sup> *Maurer v. Hamilton*, 309 U.S. 598, 614 (1940), and cases cited at Pet. 21, n. 32.

<sup>5</sup> See *Caminetti v. United States*, 242 U.S. 470, 485 (1917), and cases cited at Pet. 25, n. 37.

<sup>6</sup> Even a brief glance at the decision refutes the suggestion of the FCC's opposition (p. 17) that this holding is merely "dictum." It is in fact the only stated basis for the court's decision, since the court never explicitly decided whether Section 214 would have applied to the facility in the absence of Section 221(b). 464 F.2d at 803.

logic of that case applies with even greater force to the present one.

Just like the switching facility involved in *Kitchen*, practically all telephone terminal equipment is used for and in connection with intrastate and exchange service. This basic use and capability persist even if the terminal equipment, like the *Kitchen* switching facility, can and sometimes does handle interstate calls. Thus, here (as in *Kitchen*) the reservation of state jurisdiction in Section 221(b)—“[n]othing in this Act . . .”—precludes FCC regulation “[e]ven if” (as in *Kitchen*) federal jurisdiction might otherwise reach the facility under other provisions of Title II. 464 F.2d at 803.

## II. The Oppositions Actually Underscore the Lower Court’s Departure from the Statutory Language and Legislative Intent.

1. The statutory language of the Act, the necessary starting point for inquiry (*Caminetti v. United States, supra*), states that “[n]othing in this Act” shall apply or “give the Commission jurisdiction” respecting “facilities” used for or in connection with “intrastate” or “exchange” service. The FCC’s opposition does not and cannot deny that telephone terminal equipment is generally used for intrastate and exchange service over 95 percent of the time, that it is ordinarily furnished under intrastate and exchange tariffs, and that it is an essential and recognized item of exchange plant. Pet. 6-7. Instead, the FCC opposition *rewrites* the statute by paraphrasing its language as if it purported to reserve state jurisdiction only over what the FCC calls “purely intrastate matters, 47 U.S.C. 152(b), 221(b).” FCC Br. 4. *See also id.* at 15.

However, the statute does *not* exclude FCC authority only over “purely intrastate matters,” either in those terms or by any other such qualification stated in Sections 2(b)(1) or 221(b). It says, in embracing language, that the FCC lacks authority over facilities used “for or in connection with” intrastate or exchange service.<sup>7</sup> Sections 2(b)(1) and 221(b)’s “facilities” language would in fact have been surplusage if it were limited to “purely intrastate” facilities, as the FCC intends that phrase, since (as the FCC itself asserts) practically all intrastate and exchange facilities may intermittently be used for interstate communication. The non-existent qualification which the FCC now imputes to Congress is further disproved by Section 221(b)’s explicit provision that the section applies to exchange matters even where the service involved “constitutes interstate . . . communication.”<sup>8</sup>

Once Sections 2(b)(1) and 221(b) are given their plain and conventional meaning, they obliterate the FCC’s basic claim that it has plenary power over terminal equipment under Sections 2(a) and 201-05. FCC Br. 13-14; API Br. 15. For, even if the FCC otherwise possessed statutory power to regulate telephone ter-

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<sup>7</sup> Congress was well aware that telephones and other facilities could also and were in fact used for interstate communication a fraction of the time. See *Doniphan Telephone Co. v. AT&T*, 34 F.C.C. 950, 967 (1962), *aff’d*, 34 F.C.C. 949 (1963).

<sup>8</sup> The FCC does not deny that exchange rates are outside its jurisdiction even where the exchange overlaps a state line and the calls are clearly interstate communications. *Southwestern Bell Telephone Co. v. United States*, 45 F. Supp. 403 (W.D. Mo. 1942). What it never explains is how the statute can be read to protect exchange “rates” but not exchange “facilities” when both words are used in the same context as part of the same statutory limitation on FCC authority.

minal equipment under such provisions of Title II, regulation would be foreclosed by Congress' express command that "[n]othing in this Act" shall extend to facilities covered by Sections 2(b)(1) and 221(b).<sup>9</sup> This is what the language says; and, as *Kitchen* confirms, this is what it means. See pp. 5-6, above.<sup>10</sup>

2. Contrary to the FCC's claim (pp. 18-19), the legislative history and purpose of the Act cannot be squared with the decision below. See also API Br. 12. The petition showed (pp. 29-30) that Congress sought deliberately to preserve existing state regulation, "to protect the State Commissions from being overridden by the [FCC]," and to assure the states "exclusive" jurisdiction within their respective spheres.<sup>11</sup> This existing state regulation prior to 1934 unquestionably embraced regulation of terminal equipment connected to local exchanges, a point which respondents do not

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<sup>9</sup> The proviso in Sections 2(b)(1) and 221(b) reserving the FCC's Section 301 radio license power confirms Congress' intention that Sections 2(b)(1) and 221(b) override other general FCC powers not explicitly exempted.

<sup>10</sup> The FCC opposition (p. 13) suggests that judicial review by this Court may be unwarranted because of alleged "legislative attention" to the issue. See also ARINC Br. 7. The only bills concerning terminal equipment died in the last Congress; and in any case the interpretation of the present statute is the responsibility of the courts. The FCC's argument is especially puzzling since, in opposing further consideration of the jurisdictional issue by the Fourth Circuit, the FCC has argued to the court below: "[I]f petitioners wish to challenge the wisdom of [the decision in this case], they should petition the Supreme Court for a writ of certiorari." Resp. Br. 45 n. 50, filed in *North Carolina Utils. Comm'n v. FCC*, 4th Cir., No. 76-1002 and consolidated cases.

<sup>11</sup> *Hearings on H.R. 8301, Before the House Committee on Interstate and Foreign Commerce*, 73rd Cong., 2d Sess. 136 (1934); S.Rep. No. 781, 73rd Cong., 2d Sess. 3 (1934).

dispute and which is confirmed by countless state decisions both before and after passage of the Act. *E.g.*, Pet. 21-22, n. 33.

The FCC is not responsive when it argues in its opposition that the legislative history does not indicate Congress' desire to withhold from the FCC authority over "terminal equipment" which may be used in interstate as well as intrastate communication. FCC Br. 18. There is no reason why the legislative history should single out terminal equipment, because Congress was expressly reserving to the states jurisdiction over *all* "charges, classifications, practices, services, *facilities*, or regulations" for or in connection for intrastate or exchange service. Sections 2(b)(1), 221(b) (emphasis added). Congress' repeated expressions of intent to preserve existing state jurisdiction (which included regulation of terminal equipment), coupled with the express reference to "*facilities*" in Sections 2(b)(1) and 221(b), are more than ample proof of Congress' objective.<sup>12</sup>

Finally, no weight can be accorded to generalized claims that the jurisdictional power claimed by the FCC is needed to achieve the "purpose" of the Com-

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<sup>12</sup> The FCC relies pp. (18-19) on purported countervailing evidence that Congress intended to create an FCC capable of implementing national policy "unhampered by potentially conflicting local policies. See, *e.g.*, 78 Cong. Rec. 8822 (1934) (remarks of Senator Dill)." Examination of the cited page reveals no dissatisfaction with, let alone any intent to override, local policies or existing state regulation; and this very passage makes clear that Senator Dill's actual concern was not to supersede state regulation but to close a regulatory hiatus created by what he called the ICC's "cur-sory attention" to growing interstate telephone service. *Id.* Indeed, in the same speech Senator Dill expressly noted the protection afforded by the Act to existing state regulation. *Id.* at 8823.

munications Act. *E.g.*, FCC Br. 14; API Br. 16. The preservation of state authority was no less a “purpose” of Congress than effective FCC regulation; Congress plainly concluded that both could be achieved by retaining state control over all “facilities” used for in connection with intrastate and exchange communications; and this judgment is amply confirmed by the extraordinary quality of telephone service achieved in the decades since the Act, during which time state regulation has continued without significant FCC interference.

3. Finally, despite the FCC’s claims to the contrary, past administrative practice clearly supports petitioners and not the decision below. The petition showed that for many years before and after the Act the states have continued to regulate terminal equipment matters in countless proceedings. Pet. 21-22. Throughout this period to the present, almost all terminal equipment has continued to be provided on rates, terms and conditions reflected in tariffs filed with state regulatory agencies. *Id.* at 6. The overwhelming use of such equipment is for intrastate communications. *Id.* at 6-7.<sup>13</sup>

Without directly challenging any of these facts, the FCC opposition (pp. 19-21) contends that the FCC has in the past asserted a right to regulate terminal equipment but has not previously been forced to override state authority in this sphere because the states have “acquiesced” in FCC regulatory policy. Even were

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<sup>13</sup> API Br. 12 asserts that the pre-1934 examples of state regulation are irrelevant. Since the legislative history of the Act shows an intent to *preserve* existing state regulation, the scope of state activity prior to the Act is manifestly pertinent. In any case, the same state regulation has continued for over 40 years since the passage of the Act. See Pet. 28-29.

this version of events correct—which it is not<sup>14</sup>—it would merely underscore the need for certiorari. For, whatever the FCC's past theoretical claims, the present decision is concededly the first major attempt to displace state regulation of terminal equipment, and the practical reality of this usurpation is what makes certiorari singularly important.

In view of the existing direct conflict between the states and the FCC, and the FCC's attempted preemption, the present case cannot on any view of the matter be "simply one more link" in an alleged "unbroken chain" of FCC decisions. See API Br. 9-10. Moreover, this "unbroken chain" is created by respondents' repeated citation and reshuffling of the same small group of FCC cases to present a virtual illusion of precedent. See FCC Br. 5 n. 4; API Br. 8, 10. When the actual facts and language of the citations are examined, the FCC's own cases turn out to provide little real support for its present jurisdictional claim, and none at all for preemption of state authority. See, *e.g.*, Pet. 31 n. 43.

As for the judicial decisions, the precedent most squarely in point—the *Kitchen* case—is directly contrary to the FCC's position. The principal jurisdictional citations relied on by the FCC are two *per curiam* decisions of the same circuit (FCC Br. 6 n. 5),

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<sup>14</sup> The FCC's version of history rests primarily on a misdescription of the *Carterfone* case. FCC Br. 7, 21. *Carterfone* did not in fact establish a general policy requiring connection of customer-provided terminal equipment in which the states then acquiesced. *Carterfone* involved connection of a radio system with a telephone system (13 F.C.C. 2d at 441) and the FCC itself stressed that the decision did not hold that a customer could substitute his own telephone equipment for that of the carriers. 14 F.C.C. 2d at 572.

neither of which contains any substantive reasoning or holding helpful to the FCC.<sup>15</sup> Manifestly, the decision below in this case, rendered by a two-to-one vote and deprived of *en banc* review by disqualification of judges, is one this Court should review.

### CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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<sup>15</sup> *St. Joseph Tel. & Tel. Co. v. FCC*, 505 F.2d 476 (D.C. Cir. 1974) (brief unpublished memorandum); *Mebane Home Tel. Co. v. FCC*, D.C. Cir., No. 75-1617, April 30, 1976 (four sentence order).

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